

REFERENCE TITLE: capital case litigation; public defender

State of Arizona  
Senate  
Forty-seventh Legislature  
Second Regular Session  
2006

## **SB 1376**

Introduced by  
Senators Huppenthal: Allen, Burns

### **AN ACT**

AMENDING SECTIONS 13-4041 AND 13-4234, ARIZONA REVISED STATUTES; AMENDING TITLE 41, CHAPTER 27, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 41-3011.11; AMENDING TITLE 41, ARIZONA REVISED STATUTES, BY ADDING CHAPTER 41; MAKING AN APPROPRIATION; RELATING TO CAPITAL CASES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 13-4041, Arizona Revised Statutes, is amended to  
3 read:

4 13-4041. Fee of counsel assigned in criminal proceeding or  
5 insanity hearing on appeal or in postconviction  
6 relief proceedings; reimbursement; definitions

7 A. Except pursuant to subsection G of this section, if counsel is  
8 appointed by the court to represent the defendant in either a criminal  
9 proceeding or insanity hearing on appeal, the county in which the court from  
10 which the appeal is taken presides shall pay counsel, except that in those  
11 appeals where the defendant is represented by a public defender or other  
12 publicly funded office, compensation shall not be set or paid. Compensation  
13 for services rendered on appeal shall be in an amount as the supreme court in  
14 its discretion deems reasonable, considering the services performed.

15 B. After the supreme court has affirmed a defendant's conviction and  
16 sentence in a capital case, the supreme court, or if authorized by the  
17 supreme court, the presiding judge of the county from which the case  
18 originated shall appoint counsel to represent the capital defendant in the  
19 state ~~post-conviction~~ POSTCONVICTION relief proceeding. ~~Counsel shall meet~~  
20 ~~the following qualifications:~~ THE COURT SHALL APPOINT COUNSEL FROM THE STATE  
21 CAPITAL POSTCONVICTION PUBLIC DEFENDER OFFICE UNLESS A CONFLICT EXISTS OR THE  
22 COURT MAKES A FINDING THAT THE OFFICE CANNOT REPRESENT THE DEFENDANT.

23 ~~1. Membership in good standing of the state bar of Arizona for at~~  
24 ~~least five years immediately preceding the appointment.~~

25 ~~2. Practice in the area of state criminal appeals or post-conviction~~  
26 ~~proceedings for at least three years immediately preceding the appointment.~~

27 ~~3. No previous representation of the capital defendant in the case~~  
28 ~~either in the trial court or in the direct appeal, unless the defendant and~~  
29 ~~counsel expressly request continued representation and waive all potential~~  
30 ~~issues that are foreclosed by continued representation.~~

31 C. NOTWITHSTANDING SUBSECTION B OF THIS SECTION, the supreme court  
32 shall establish and maintain a list of PERSONS WHO ARE qualified ~~candidates.~~  
33 ~~In addition to the qualifications prescribed in subsection B of this section,~~  
34 ~~TO REPRESENT CAPITAL DEFENDANTS IN THOSE CASES IN WHICH THE COURT DOES NOT~~  
35 ~~APPOINT COUNSEL FROM THE STATE CAPITAL POSTCONVICTION PUBIC DEFENDER OFFICE.~~  
36 The supreme court may establish by rule more stringent standards of  
37 competency for the appointment of ~~post-conviction~~ POSTCONVICTION counsel in  
38 capital cases ~~THAN ARE PROVIDED BY THIS SUBSECTION.~~ The supreme court may  
39 refuse to certify an attorney on the list who meets the qualifications  
40 established under THIS subsection ~~B of this section~~ or may remove an attorney  
41 from the list who meets the qualifications established under THIS subsection  
42 ~~B of this section~~ if the supreme court determines that the attorney is  
43 incapable or unable to adequately represent a capital defendant. The court  
44 shall appoint counsel ~~pursuant to subsection B of this section~~ from the list.

COUNSEL WHO ARE APPOINTED FROM THE LIST SHALL MEET THE FOLLOWING QUALIFICATIONS:

1. MEMBERSHIP IN GOOD STANDING OF THE STATE BAR OF ARIZONA FOR AT LEAST FIVE YEARS IMMEDIATELY PRECEDING THE APPOINTMENT.

2. PRACTICE IN THE AREA OF STATE CRIMINAL APPEALS OR POSTCONVICTION PROCEEDINGS FOR AT LEAST THREE YEARS IMMEDIATELY PRECEDING THE APPOINTMENT.

3. NO PREVIOUS REPRESENTATION OF THE CAPITAL DEFENDANT IN THE CASE EITHER IN THE TRIAL COURT OR IN THE DIRECT APPEAL, UNLESS THE DEFENDANT AND COUNSEL EXPRESSLY REQUEST CONTINUED REPRESENTATION AND WAIVE ALL POTENTIAL ISSUES THAT ARE FORECLOSED BY CONTINUED REPRESENTATION.

~~D. Notwithstanding subsection C of this section, the court may appoint counsel pursuant to subsection B of this section from outside the list of qualified candidates if either:~~

~~1. No counsel meets the qualifications under subsections B and C of this section.~~

~~2. No qualified counsel is available to serve.~~

~~E.~~ D. Before filing a petition, the capital defendant may personally appear before the trial court and waive counsel. If the trial court finds that the waiver is knowing and voluntary, appointed counsel may withdraw. The time limits in which to file a petition shall not be extended due solely to the change from appointed counsel to self-representation.

~~F.~~ E. If at any time the trial court determines that the capital defendant is not indigent, appointed counsel shall no longer be compensated by public monies and may withdraw.

~~G.~~ F. Unless counsel is employed by a publicly funded office, counsel appointed to represent a capital defendant in state ~~post-conviction~~ POSTCONVICTION relief proceedings shall be paid an hourly rate of not to exceed one hundred dollars per hour for up to two hundred hours of work, whether or not a petition is filed. Monies shall not be paid to court appointed counsel unless either:

1. A petition is timely filed.

2. If a petition is not filed, a notice is timely filed stating that counsel has reviewed the record and found no meritorious claim.

~~H.~~ G. On a showing of good cause, the trial court shall compensate appointed counsel from county funds in addition to the amount of compensation prescribed by subsection ~~G~~ F of this section by paying an hourly rate in an amount that does not exceed one hundred dollars per hour. The attorney may establish good cause for additional fees by demonstrating that the attorney spent over two hundred hours representing the defendant in the proceedings. The court shall review and approve additional reasonable fees and costs. If the attorney believes that the court has set an unreasonably low hourly rate or if the court finds that the hours the attorney spent over the two hundred hour threshold are unreasonable, the attorney may file a special action with the Arizona supreme court. If counsel is appointed in

1 successive ~~post-conviction~~ POSTCONVICTION relief proceedings, compensation  
2 shall be paid pursuant to section 13-4013, subsection A.

3 ~~I.~~ H. The county shall request reimbursement for fees it incurs  
4 pursuant to subsections F, G, ~~H~~ and ~~J~~ I of this section arising out of the  
5 appointment of counsel to represent an indigent capital defendant in a state  
6 ~~post-conviction~~ POSTCONVICTION relief proceeding. The state shall pay fifty  
7 per cent of the fees incurred by the county out of monies appropriated to the  
8 supreme court for these purposes. The supreme court shall approve county  
9 requests for reimbursement after certification that the amount requested is  
10 owed.

11 ~~J.~~ I. The trial court may authorize additional monies to pay for  
12 investigative and expert services that are reasonably necessary to adequately  
13 litigate those claims that are not precluded by section 13-4232.

14 Sec. 2. Section 13-4234, Arizona Revised Statutes, is amended to read:

15 13-4234. Commencement of proceedings; notice; appointment of  
16 counsel for capital defendants; assignment of judge;  
17 stay

18 A. A proceeding is commenced by timely filing a notice of  
19 ~~post-conviction~~ POSTCONVICTION relief with the clerk of the court in which  
20 the conviction occurred. The clerk of the trial court shall provide notice  
21 forms for commencement of first and successive ~~post-conviction~~ POSTCONVICTION  
22 relief proceedings. The notice shall bear the caption of the original  
23 criminal action to which it pertains. The notice in successive  
24 ~~post-conviction~~ POSTCONVICTION relief proceedings shall comply with section  
25 13-4232, subsection B. On receipt of the notice, the clerk of the trial  
26 court shall file a copy of the notice in the case file of each original  
27 action and promptly send copies to the defendant, the defendant's attorney,  
28 if known, the county attorney and the attorney general, noting the date and  
29 manner of sending the copies in the record. The state shall notify the  
30 victim on request.

31 B. If an appeal of the defendant's conviction or sentence, or both, is  
32 pending, the clerk, within five days after the filing of the notice for  
33 ~~post-conviction~~ POSTCONVICTION relief, shall send a copy of the notice to the  
34 appropriate appellate court, noting the date and manner of sending the copy  
35 in the record.

36 C. In noncapital cases, the notice shall be filed within ninety days  
37 after the judgment and sentence are entered or within thirty days after the  
38 order and mandate affirming the judgment and sentence is issued on direct  
39 appeal, whichever is later. A defendant has sixty days from the filing of  
40 the notice in which to file a petition. On the filing of a successive  
41 notice, a defendant has thirty days from the filing of the notice in which to  
42 file a petition.

43 D. In capital cases, on the issuance of a mandate affirming the  
44 defendant's conviction and sentence on direct appeal, the clerk of the  
45 supreme court expeditiously shall file a notice of ~~post-conviction~~

1 POSTCONVICTION relief with the trial court. On the first notice in capital  
2 cases, a defendant has sixty days from the filing of the notice in which to  
3 file a petition. The supreme court shall appoint counsel pursuant to section  
4 13-4041, subsection B. All indigent state prisoners under a capital sentence  
5 are entitled to the appointment of counsel to represent them in state  
6 ~~post-conviction~~ POSTCONVICTION proceedings. A competent indigent defendant  
7 may reject the offer of counsel with an understanding of its legal  
8 consequence. On successive notice in capital cases, the trial court shall  
9 appoint the previous ~~post-conviction~~ POSTCONVICTION relief counsel of the  
10 capital defendant unless counsel is waived pursuant to section 13-4041,  
11 subsection ~~E~~ D or good cause exists to appoint another qualified attorney  
12 pursuant to section 13-4041, subsection B. On the filing of a successive  
13 notice, a capital defendant or an appointed attorney has thirty days from the  
14 filing of the notice in which to file a petition.

15 E. A defendant who has pled guilty and who is precluded from filing a  
16 direct appeal pursuant to section 13-4033 may be granted an additional thirty  
17 day extension of time in which to file the petition if the defendant's  
18 counsel refuses to raise issues and leaves the defendant insufficient time to  
19 file a petition within the time limits.

20 F. On a specific and detailed showing of good cause, a defendant in a  
21 noncapital case may be granted up to a sixty day extension of time in which  
22 to file the petition. On a specific and detailed showing of good cause, a  
23 defendant in a capital case may be granted one thirty day extension of time  
24 in which to file the petition.

25 G. The time limits are jurisdictional, and an untimely filed notice or  
26 petition shall be dismissed with prejudice.

27 H. If the record of the trial proceeding has not been transcribed, the  
28 defendant may request on a form provided by the clerk of the superior court  
29 that the record be prepared. The court shall order that those portions of  
30 the record be prepared that it deems necessary to resolve the issues to be  
31 raised in the petition. The preparation of the record is a county expense if  
32 the defendant is indigent. The time for filing the petition is tolled from  
33 the time a request for the record is made until the record is prepared or the  
34 request is denied.

35 I. The proceeding shall be assigned to the sentencing judge if it is  
36 possible. If it appears that the sentencing judge's testimony is relevant,  
37 the sentencing judge shall transfer the case to another judge.

38 J. If the defendant has received a sentence of death and the supreme  
39 court has fixed the time for execution of the sentence, a stay of execution  
40 shall not be granted on the filing of a second or subsequent petition except  
41 on separate application for a stay to the supreme court setting forth with  
42 particularity those issues raised which are not precluded under section  
43 13-4232. The warrant shall not be stayed to allow for the filing of a  
44 petition.

1       Sec. 3. Title 41, chapter 27, article 2, Arizona Revised Statutes, is  
2 amended by adding section 41-3011.11, to read:

3       41-3011.11. State capital postconviction public defender  
4       office; termination July 1, 2011

5       A. THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER OFFICE TERMINATES  
6 ON JULY 1, 2011.

7       B. TITLE 41, CHAPTER 41 IS REPEALED ON JANUARY 1, 2012.

8       Sec. 4. Title 41, Arizona Revised Statutes, is amended by adding  
9 chapter 41, to read:

10                               CHAPTER 41

11                   STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER OFFICE

12                               ARTICLE 1. GENERAL PROVISIONS

13       41-4251. State capital postconviction public defender; office;  
14       appointment; qualifications; duties

15       A. THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER OFFICE IS  
16 ESTABLISHED.

17       B. THE STATE IS RESPONSIBLE FOR FUNDING THE STATE CAPITAL  
18 POSTCONVICTION PUBLIC DEFENDER OFFICE, INCLUDING START-UP COSTS.

19       C. THE GOVERNOR SHALL APPOINT THE STATE CAPITAL POSTCONVICTION PUBLIC  
20 DEFENDER AND FILL ANY VACANCY IN THE OFFICE ON THE BASIS OF MERIT ALONE  
21 WITHOUT REGARD TO POLITICAL AFFILIATION FROM THE LIST OF NAMES THAT ARE  
22 SUBMITTED PURSUANT TO SECTIONS 41-4252 AND 38-211. THE STATE CAPITAL  
23 POSTCONVICTION PUBLIC DEFENDER SERVES A FOUR YEAR TERM AND SERVES UNTIL THE  
24 APPOINTMENT AND QUALIFICATION OF A SUCCESSOR IN OFFICE. AFTER APPOINTMENT,  
25 THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER IS SUBJECT TO REMOVAL FROM  
26 OFFICE ONLY FOR GOOD CAUSE AS DETERMINED BY A MAJORITY VOTE OF THE  
27 NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE. A  
28 VACANCY SHALL BE FILLED FOR THE BALANCE OF THE UNEXPIRED TERM.

29       D. THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER SHALL MEET ALL OF  
30 THE FOLLOWING CRITERIA:

31               1. BE A MEMBER IN GOOD STANDING OF THE STATE BAR OF ARIZONA OR BECOME  
32 A MEMBER OF THE STATE BAR OF ARIZONA WITHIN ONE YEAR AFTER APPOINTMENT.

33               2. HAVE BEEN A MEMBER OF THE STATE BAR OF ARIZONA OR ADMITTED TO  
34 PRACTICE IN ANY OTHER STATE FOR THE FIVE YEARS IMMEDIATELY PRECEDING THE  
35 APPOINTMENT.

36               3. HAVE HAD SUBSTANTIAL EXPERIENCE IN THE REPRESENTATION OF ACCUSED OR  
37 CONVICTED PERSONS IN CRIMINAL OR JUVENILE PROCEEDINGS.

38               4. MEET OR EXCEED THE STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL  
39 CASES UNDER RULE 6.8, ARIZONA RULES OF CRIMINAL PROCEDURE, AS DETERMINED BY  
40 THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT DEFENSE.

41       E. THE SALARY OF THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER  
42 SHALL EQUAL THE ANNUAL SALARY OF THE CHIEF COUNSEL OF THE CAPITAL LITIGATION  
43 SECTION IN THE OFFICE OF THE ATTORNEY GENERAL.

44       F. THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER SHALL:

1           1. REPRESENT ANY PERSON WHO IS NOT FINANCIALLY ABLE TO EMPLOY COUNSEL  
2 IN POSTCONVICTION RELIEF PROCEEDINGS IN STATE COURT AFTER A JUDGMENT OF DEATH  
3 HAS BEEN RENDERED. NOTWITHSTANDING SECTION 11-584, SUBSECTION A, PARAGRAPH  
4 1, SUBDIVISION (g), AFTER A JUDGMENT OF DEATH HAS BEEN RENDERED, THE COUNTY  
5 PUBLIC DEFENDER SHALL NOT HANDLE POSTCONVICTION RELIEF PROCEEDINGS IN STATE  
6 COURT UNLESS A CONFLICT EXISTS WITH THE STATE CAPITAL POSTCONVICTION PUBLIC  
7 DEFENDER AND THE COUNTY PUBLIC DEFENDER IS APPOINTED.

8           2. SUPERVISE THE OPERATION, ACTIVITIES, POLICIES AND PROCEDURES OF THE  
9 STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER OFFICE.

10          3. BEGINNING IN FISCAL YEAR 2007-2008, SUBMIT AN ANNUAL BUDGET FOR THE  
11 OPERATION OF THE OFFICE TO THE LEGISLATURE.

12          4. NOT ENGAGE IN THE PRIVATE PRACTICE OF LAW OR PROVIDE OUTSIDE  
13 COUNSEL TO ANY OTHER ATTORNEY OUTSIDE OF THE STATE CAPITAL POSTCONVICTION  
14 PUBLIC DEFENDER OFFICE.

15          5. NOT PROVIDE TRAINING OUTSIDE OF THE STATE CAPITAL POSTCONVICTION  
16 PUBLIC DEFENDER OFFICE UNLESS THE TRAINING IS PROVIDED TO ALL MEMBERS OF THE  
17 STATE BAR.

18          6. NOT LOBBY THE STATE LEGISLATURE OR THE CONGRESS OF THE UNITED  
19 STATES FOR A MORATORIUM ON OR THE ABOLITION OF CAPITAL PUNISHMENT.

20          7. ALLOCATE PERSONNEL AND RESOURCES TO POSTCONVICTION RELIEF  
21 PROCEEDINGS SO LONG AS THERE ARE NO CONFLICTS OF INTEREST IN REPRESENTATION  
22 AND ALL STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER ATTORNEYS ARE APPOINTED  
23 TO POSTCONVICTION RELIEF CASES THAT ARE ELIGIBLE FOR APPOINTMENT OF COUNSEL  
24 UNDER SECTION 13-4041.

25          G. THE STATE CAPITAL POSTCONVICTION PUBLIC DEFENDER MAY:

26           1. ACCEPT AND SPEND PUBLIC AND PRIVATE GIFTS AND GRANTS FOR USE IN  
27 IMPROVING AND ENHANCING CAPITAL INDIGENT DEFENSE REPRESENTATION.

28           2. EMPLOY DEPUTIES AND OTHER EMPLOYEES AND ESTABLISH AND OPERATE ANY  
29 OFFICES AS NEEDED FOR THE PROPER PERFORMANCE OF THE DUTIES OF THE OFFICE.

30          41-4252. Nomination, retention and standards commission on  
31 indigent defense; membership

32          A. THE NOMINATION, RETENTION AND STANDARDS COMMISSION ON INDIGENT  
33 DEFENSE IS ESTABLISHED CONSISTING OF THE FOLLOWING MEMBERS:

34           1. TWO COUNTY PUBLIC DEFENDERS WHO ARE APPOINTED BY THE GOVERNOR, ONE  
35 OF WHOM IS FROM A COUNTY WITH A POPULATION OF FIVE HUNDRED THOUSAND OR MORE  
36 PERSONS AND ONE OF WHOM IS FROM A COUNTY WITH A POPULATION OF LESS THAN FIVE  
37 HUNDRED THOUSAND PERSONS.

38           2. ONE CRIMINAL DEFENSE ATTORNEY WHO IS RECOMMENDED BY THE ARIZONA  
39 ATTORNEYS FOR CRIMINAL JUSTICE AND WHO IS APPOINTED BY THE GOVERNOR.

40           3. ONE CRIMINAL DEFENSE ATTORNEY WHO IS RECOMMENDED BY THE STATE BAR  
41 OF ARIZONA AND WHO IS APPOINTED BY THE CHIEF JUSTICE OF THE SUPREME COURT.

42           4. TWO PRIVATE CITIZENS WHO ARE APPOINTED BY THE GOVERNOR, NEITHER OF  
43 WHOM IS A JUDGE, LAW ENFORCEMENT OFFICER, PROSECUTOR OR COURT APPOINTED  
44 EMPLOYEE.

45           5. ONE PRIVATE DEFENSE ATTORNEY WHO IS APPOINTED BY THE GOVERNOR.

1 B. COMMISSION MEMBERS SERVE THREE YEAR TERMS AND UNTIL THE MEMBER'S  
2 SUCCESSOR IS DULY APPOINTED AND QUALIFIED. AN APPOINTMENT TO FILL A VACANCY  
3 RESULTING OTHER THAN FROM EXPIRATION OF A TERM IS FOR THE UNEXPIRED PORTION  
4 OF THE TERM ONLY.

5 C. AT ALL TIMES DURING THEIR TERMS, COMMISSION MEMBERS SHALL MAINTAIN  
6 THE OCCUPATIONAL STATUS UNDER WHICH THEY WERE APPOINTED OR SHALL BE REPLACED  
7 BY A PERSON WHO IS OTHERWISE QUALIFIED.

8 D. ON THE ORIGINAL NOMINATION FOR, OR WITHIN THIRTY DAYS AFTER THE  
9 OCCURRENCE OF A VACANCY IN, THE OFFICE OF THE STATE CAPITAL POSTCONVICTION  
10 PUBLIC DEFENDER, THE COMMISSION SHALL SUBMIT TO THE GOVERNOR THE NAMES OF AT  
11 LEAST THREE PERSONS WHO ARE NOMINATED TO FILL THE VACANCY, NO MORE THAN  
12 TWO-THIRDS OF WHOM ARE MEMBERS OF THE SAME POLITICAL PARTY.

13 Sec. 5. Initial appointment of state capital postconviction  
14 public defender

15 The initial state capital postconviction public defender shall be  
16 appointed for a term beginning on January 1, 2007 and ending on the third  
17 Monday in January, 2011. Thereafter, all appointments shall be made pursuant  
18 to statute.

19 Sec. 6. Initial terms of members of the nomination, retention  
20 and standards commission on indigent defense

21 A. Notwithstanding section 41-4252, Arizona Revised Statutes, as added  
22 by this act, the initial terms of members of the nomination, retention and  
23 standards commission are:

- 24 1. Three terms ending January 1, 2008.
- 25 2. Four terms ending January 1, 2009.

26 B. The appropriate official shall make all subsequent appointments as  
27 prescribed by statute.

28 Sec. 7. Appropriation; purposes; exemption

29 A. The sum of \$\_\_\_\_\_ is appropriated from the state general fund  
30 in fiscal year 2007-2008 to the state capital postconviction public defender  
31 office for the purposes prescribed by section 41-4251, Arizona Revised  
32 Statutes, as added by this act.

33 B. The appropriation made in subsection A of this section is exempt  
34 from the provisions of section 35-190, Arizona Revised Statutes, relating to  
35 lapsing of appropriations.

36 Sec. 8. Effective date

37 Section 13-4041, Arizona Revised Statutes, as amended by section 1 of  
38 this act, is effective from and after December 31, 2006.

39 Sec. 9. Purpose

40 Pursuant to section 41-2955, subsection B, Arizona Revised Statutes,  
41 the purpose of the state capital postconviction public defender office is to  
42 provide representation to any person who is not financially able to employ  
43 counsel in postconviction relief proceedings in state court after a judgment  
44 of death has been rendered.